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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JAMES ANDREW GUASCH, Defendant and Appellant.	H032720 (Santa Clara County Super. Ct. No. CC771595)

I. STATEMENT OF THE CASE

A jury convicted defendant James Andrew Guasch of solicitation to commit murder; two counts of transporting, selling, or distributing oxycodone, a controlled substance; possession of oxycodone for sale; possession of "injectibles/merpedine," a controlled substance, for sale; and possession of methamphetamine. (Pen. Code, § 653f, subd. (b)[1]; Health & Saf. Code, §§ 11352, subd. (a), 11351, 11377, subd. (a).) Defendant admitted an enhancement allegation that he was out of custody on bail in another felony case when he committed the offenses. (Pen. Code, § 12022.1.) The court imposed a midterm of six years for solicitation; consecutive 16-month terms for both counts of transporting, selling, et cetera oxycodone; a consecutive one-year term for possession of oxycodone for sale; a consecutive eight-month term for possession of methamphetamine;

[1] All unspecified statutory references are to the Penal Code.

and a concurrent three-year term for possession of "injectibles/merpedine." The court also imposed a two-year term for the enhancement but stayed its execution.

On appeal from the judgment, defendant claims there is insufficient evidence to support the conviction for solicitation. He claims the court erred in admitting an informant's tape-recorded statement, the informant's live testimony, and evidence of unrelated misconduct. Alternatively, he claims defense counsel rendered ineffective assistance in failing to object to the admission of that evidence. He claims the court erred in excluding evidence of a pending criminal case against the informant. He claims the prosecutor committed a *Brady*[2] violation in failing to produce evidence of a request for leniency for the informant. He claims the prosecutor was guilty of misconduct during closing argument, and alternatively that counsel rendered ineffective assistance in failing to object to the misconduct. And last defendant claims the court erred in imposing separate terms for the two counts of transporting, selling, et cetera oxycodone.

We agree with defendant's last claim, modify the judgment to stay one of the terms, and affirm the judgment as modified.[3]

II. FACTS

Defendant, a retired firefighter, and his wife Charlene were married for 27 years and had two children. They owned Sequoia Cleaners, where Mrs. Guasch handled the day-to-day operations.

Mrs. Guasch testified that often when defendant got angry at her, he would say that there was a "mine shaft in Nevada with your name on it" and that he had a "shotgun

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[2] *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*).

[3] In addition to this appeal, defendant filed a petition for a writ of habeas corpus (H033066), in which he reiterates his claims of a *Brady* violation and ineffective assistance of counsel. We ordered the petition to be considered with the appeal and dispose of it by separate order.

and a shell" and that she would not be missed.[4] Defendant's neighbor Gale Leung also heard him make such threats. Leung's roommate Mike Evanson heard defendant say at least five times that one mine shaft had Mrs. Guasch's name on it.

In 2004, defendant complained to Mr. Evanson that Mrs. Guasch was cold and sexually inattentive. Around that time, defendant met Steve Pawlaczyk and his wife, Dana.

Mr. Pawlaczyk testified that defendant hired him for various jobs. The Pawlaczyks also used drugs with defendant. According to Mr. Pawlaczyk, defendant sold methamphetamines and pharmaceutical drugs that he would get from a friend who collected expired drugs from pharmacies and hospitals. Defendant provided his girlfriend, Pamela Carmody, with drugs, and sometimes Mr. Pawlaczyk sold drugs for defendant.

On April 9, 2006, Ms. Carmody moved into defendant's house, and he told Mrs. Guasch to stay in the back. She moved out. The next day, Mr. Evanson warned Mrs. Guasch about defendant and advised her about how to protect herself and avoid surveillance.[5] Shortly thereafter, Mrs. Guasch filed for divorce and obtained a stay-away order against defendant and an order freezing their assets, which defendant had been liquidating. Mrs. Guasch also hired a body guard because defendant's behavior had become wildly erratic, he owned several guns, and she was afraid he would kill her.

On April 18, Mrs. Guasch stayed with Leung and Evanson at their residence. She did not tell defendant. However, the next day, he called her there and said her car needed oil. Mrs. Guasch looked out the window and saw that defendant had moved her car and was staring at the Leung-Evanson house. Frightened, Mrs. Guasch called Mr. Evanson,

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[4] Defendant and his friends went on camping trips near mine shafts in the Nevada desert.

[5] In 2005, defendant had bragged to Ms. Leung that he had a surveillance device he used to listen to cell phone calls in the area.

and on his advice, she fled over the back fence and had a friend pick her up. Defendant called the house again and left a message, saying that he could see her and wanted to talk.

The next day defendant visited a friend, Valerie Smith. His behavior seemed erratic, and he admitted taking methamphetamines. Defendant told her that he and Mrs. Guasch were separated, and he was seeing someone else. He seemed angry at Mrs. Guasch, blamed her for his problems, and repeatedly said he could "take her out." Ms. Smith responded, "Jim, you don't want to kill her. This is crazy." Defendant just shook his head and held his breath. Later, Ms. Smith warned Mrs. Guasch about defendant, who seemed like a different person. Mrs. Guasch agreed and said she now had a body guard. Mrs. Guasch then changed the beneficiary on her life insurance from defendant to her children because she feared defendant might kill her.

Mr. Pawlaczyk testified that in May 2006, defendant repeatedly said he wanted his wife killed. Mrs. Pawlaczyk also heard defendant say this several times. Even Ms. Carmody made comments about killing Mrs. Guasch.

In June 2006, defendant told Edward Lynch, a cabin neighbor, that he had three fully automatic weapons. Defendant said he was angry at Mrs. Guasch because of the divorce and told Mr. Lynch that he wanted to kill her. Mr. Lynch thought he was exaggerating and told him to relax. However, defendant became more emphatic, repeated his threat, and said that he had been arrested for possessing illegal weapons, which he accused Mrs. Guasch of planting.

During the divorce proceedings, defendant told Mr. Evanson that Mrs. Guasch did not know whom she was "fucking with." Concerned about defendant's anger and access to weapons, Mr. Evanson offered to secure them, but defendant declined. Defendant also told his friend, Robert Duarte, that he was being mistreated during the divorce proceedings and wanted Mrs. Guasch to know that she would always have to be concerned about him and "[l]ook over her shoulder." Later, defendant sent a letter to Mr. Duarte that was disturbing because it sought to influence his testimony.

As the divorce proceedings progressed, defendant told Mrs. Guasch, "Gloves are off now. You're really gonna get it." In a declaration in family court, Mrs. Guasch stated that defendant caused her to fear for her safety. When defendant was ordered from the family house, Mr. Evanson again offered to take his weapons, and defendant agreed. Mr. Evanson took 31 guns, which police later seized.

In the summer of 2006, defendant asked David Glovin, the computer person for Sequoia Cleaners, for passwords so he could check the accounting. Mr. Glovin refused, and defendant became irate. Mr. Glovin later detected a spyware program on Mrs. Guasch's business computer and removed it.

In January 2007, Jennifer Scott, the Gausches' long time mortgage broker, was in the process of handling a court-ordered refinancing of the Guasch residence. Defendant tried to stop it, and Ms. Scott became afraid because defendant threatened her. On January 19, 2006, defendant went to Ms. Scott's company office. He threatened an escrow officer there and then headed toward Ms. Scott's office. She called the police, locked the door, and hid inside with other employees. Defendant banged on the door, but the police came and stopped him.

In February 2007, Mr. Hanson received a court order barring him from changing any of the Guasches' life insurance policies. Mr. Hanson informed defendant, who said he was "pissed off" at Mrs. Guasch.

Mr. Pawlaczyk testified that in June 2007, defendant used infrared goggles to watch Mrs. Guasch and was getting more serious about making her "go away." Mrs. Pawlaczyk testified that after Mrs. Guasch filed for divorce and obtained a restraining order against defendant, defendant said things like, "I just want her to go away." He sounded very serious. He repeatedly said that he wanted to have her killed, he talked "figures," and discussed with Mr. Pawlaczyk how to go about it. Defendant said Mrs. Guasch was making life "miserable" for him by calling the police whenever he violated the restraining order. He said that now "desperate times required desperate

measures." Defendant told Mr. Pawlaczyk that he wanted to inject Mrs. Guasch with an overdose of drugs and described how someone could get into the house through the wine cellar. Both Mr. and Mrs. Pawlaczyk testified that defendant explained how Mrs. Guasch could be dismembered and thrown down a mine shaft that he knew about a mine in the desert, where she would never be found. Defendant offered to show Mr. Pawlaczyk where the mine was located.

Mr. Pawlaczyk testified that one day defendant offered him "a job for life in the event that I would help him with the scheme to kill his wife." In response, Mr. Pawlaczyk invented a person named "Larry" and told defendant that "Larry" was a parolee, who needed money and was looking for work and could help defendant with his "problem" because he was a "problem solver." The "problem" they were talking about was Mrs. Guasch. Mr. Pawlaczyk testified that defendant offered to pay "Larry" some unspecified amount of cash and/or drugs. Defendant also said that he could provide a gun to kill his wife.

On June 25, 2007, police arrested Mr. and Mrs. Pawlaczyk on charges of commercial burglary and using a stolen credit card. At that time, Mr. Pawlaczyk told the arresting officer about defendant and expressed concern for Mrs. Guasch. The officer relayed this information to the Santa Clara County Special Enforcement Team (CSET), and CSET Agents St. Clair and Mecir interviewed Mr. and Mrs. Pawlaczyk.

During his interview, Mr. Pawlaczyk said he was talking because he did not want anything to happen to Mrs. Guasch and felt that sooner or later defendant might "get someone else to do it." He said that defendant trusted him, and he thought that by telling defendant that he would try to help him with his "problem," he could delay things until defendant was in jail. However, defendant got more desperate, saying it was "coming down to the wire and that something has to happen to his wife" because what she was doing to him. Mr. Pawlaczyk said he asked what defendant meant, and he said, " 'Well, she's gotta go. She's gotta be taken out of this situation [be]cause I have to do something

to get rid of her. If she testifies against me, I'm gonna go to prison.' " Mr. Pawlaczyk asked him again what he meant. And defendant responded, "Well, I got a hunch that—that you know . . . ." He continued, "It's out in the desert" and "I can't do anything my hands are tied."

During the interview, Mr. Pawlaczyk also said that defendant was paranoid and asked if he was wearing a "wire." Days before Mr. Pawlaczyk was arrested, defendant offered to give him a gun, saying, "You need it. Let's go; let's go." However, Mr. Pawlaczyk demurred because he did not want any trouble for himself. He said he warned defendant that if anything happened to Mrs. Guasch, the police would go straight to him and his friends. Defendant ignored him. He said he had no "option" and that if she were to "be on a milk carton" or "disappear," he would have a better chance of "getting off" his court case and would not have anything to worry about. Mr. Pawlaczyk asked if he was just kidding or serious, and defendant said that he was serious and that "something has to happen soon."

When the agents asked how defendant might get money to do something to Mrs. Guasch, Mr. Pawlaczyk opined that defendant's brother had a lot of cash. Mr. Pawlaczyk said he asked defendant what he would offer if he were to help him, and defendant said lifetime employment. Mr. Pawlaczyk told defendant he could not help because he had family and also prior strike convictions and did not want to get involved in anything serious. Mr. Pawlaczyk said that defendant then asked if Mr. Pawlaczyk knew anyone because he needed someone but if "[p]ush comes to shove, I'm gonna have to do it myself." Mr. Pawlaczyk said that he might know someone.

Mr. Pawlaczyk told the agents that on the same day, defendant said, "Man, they got me on contempt of court. I need something to happen to my wife." Defendant explained that he was going to have to do community service, and he wanted something to happen while he was gone because he would have an alibi. Defendant asked again if Mr. Pawlaczyk knew anyone, and Mr. Pawlaczyk said he knew a bank robber named

"Larry," who was on parole and looking for work. Defendant said he would be willing to meet the man anytime and pushed Mr. Pawlaczyk to set up a meeting. Mr. Pawlaczyk said he did not know what type of person defendant expected to do "that kind of a job," but this man was very serious and did not "play around." He asked defendant what he was willing to pay, and defendant said he had already started putting cash aside. Defendant asked Mr. Pawlaczyk to see what "Larry" would be willing to take. Mr. Pawlaczyk opined that he thought it would be between $20,000 and $50,000 but that "Larry" would probably not demand it all "up front." Defendant said he could probably get a gun if "Larry" needed it.

During the interview, Mr. Pawlaczyk agreed to make a recorded call to defendant. During the call, he told defendant that if he wanted to meet "Larry," he had to do so by himself because Mrs. Pawlaczyk had just been arrested, and he needed to attend to family business. Mr. Pawlaczyk gave defendant a phone number, which was the CSET cell phone number.

On June 27, 2007, Agent St. Clair called defendant, identified himself as Mr. Pawlaczyk's friend, and discussed a meeting. Agent St. Clair said they "need to get this done sooner," but defendant said they still had time. Defendant agreed to bring a picture of Mrs. Guasch. The two men met at the Spoons Restaurant in Campbell along with another agent. Defendant put photographs of Mrs. Guasch on the table. Defendant said that she had bodyguards. Defendant did not know where she was living but suggested they call Sequoia Cleaners to find out when she would be there. Defendant described the vehicles she might be driving. At times, defendant seemed comfortable and at other times, nervous and sweaty. He discussed his divorce and said he was "between a rock and a hard place." The three agreed to keep the meeting secret because someone might later talk after Mrs. Guasch was killed. Defendant mentioned the Godfather movie and believed "you don't talk." He acknowledged that some people snitch, which he found "scary."

Agent St. Clair opined that it would be better if defendant was in custody when "the bomb dropped." Defendant indicated that he thought Mrs. Guasch might try to kill him and was worried about "getting busted" However, he said, "I gotta do what I gotta do to defend myself." When Agent St. Clair mentioned the use of a mine shaft, defendant said that there were "many, many places."

Defendant told the agents that once he regained control of Sequoia Cleaners, he would have jobs for everyone. Defendant indicated that he sold drugs and could supply them. When Agent St. Clair indicated that he wanted a retainer for his services, defendant gave him a bottle of oxycodone worth $4,000. Defendant further indicated that more was available. Agent St. Clair asked for an addition retainer of $1,000. Defendant agreed and said he would call later, but he never did.

On June 28, 2007, police officers arrested defendant and seized his keys and cell phone. During a search of defendant's house, police found, among other things, a large number of controlled substances, including methamphetamines, Demerol, oxycodone pills and solution, steroids, percocet, haloperidol, valium, cocaine, testosterone gel, and Pentothal, some in amounts indicating possession for sale. They also found prescription drug stickers and glass pipes. Police seized the jacket defendant had worn to the meeting and found the photographs of Mrs. Guasch in a pocket. Police seized various pieces of electronic equipment, videotape recordings of Mrs. Guasch walking in front of the house, a loaded ammunition clip, and a digital scale.

At the time of trial, Mr. Pawlaczyk was in custody. He testified that he was currently facing two counts of commercial burglary, in that he entered a liquor store and a Safeway store with the intent to steal; and one count of unlawfully obtaining the credit card number of another person. He admitted that he used to use heroin, methamphetamines, and oxycontin but said he had been clean since entering a methadone program in December 2006.

Mr. Pawlaczyk admitted having several prior felony convictions. In 1995, he was convicted of residential burglary. Later, he was charged with six counts of first degree burglary and pleaded guilty to three counts. As a result, he received a nine-year prison term and was released on parole in 2003. Mr. Pawlaczyk also admitted that he was returned to prison for parole violations, one for possession of heroin. Mr. Pawlaczyk explained that his prior convictions rendered him potentially subject to a three-strike sentence of 25 years to life for any subsequent felony conviction. However, he said he hoped that when the authorities reviewed the current case against him, they would consider his prior strike offenses old and dismiss them in the interests of justice. He noted that a year before, he had been arrested for possession of heroin, and when the case was reviewed, the authorities declined to prosecute the matter as a felony. Rather, the arrest resulted in a parole violation and his return to prison.

Mr. Pawlaczyk said that he participated in defendant's investigation and the prosecution because of his concern for Mrs. Guasch and also because he hoped for leniency in the pending case against him. According to Mr. Pawlaczyk, the agents who interviewed him said they would "go to bat" for him as much as they could and request leniency from the District Attorney. Later his parents told him that they had spoken to Special Agent Mecir and thought that he had requested leniency.[6] Mr. Pawlaczyk testified that although he hoped for leniency, he was never promised anything in exchange for his testimony against defendant. He also said that no one ever told him that he did not have to worry about the pending charges. Nevertheless, Mr. Pawlaczyk believed that Agent Mecir had requested leniency on his behalf.

[6] Special Agent Mecir testified that after June 2007, he did not communicate or have any contact with the district attorney's office for the purpose of requesting leniency for either Mr. or Mrs. Pawlaczyk. He did not intervene in any way on behalf of either concerning the disposition of the cases against them. Rather, he testified that he simply informed the prosecutor handling defendant's case that Mr. Pawlaczyk was cooperating and had agreed to testify against defendant.

Mr. Pawlaczyk testified that ultimately the prosecution offered him a 32-month plea bargain, which he understood to mean that all but one of his strikes would be dismissed. However, at the time he testified, he had not as yet decided whether to accept the offer and remained in custody with no scheduled release date.

Mrs. Pawlaczyk testified that she had three prior convictions for computer vandalism, cultivation of marijuana, and commercial burglary and had recently pleaded guilty to using a stolen credit card, burglary, false personation, and was currently serving a 10-month term. At the time of trial, she was in custody at a regimented correctional program serving a 10-month term. She denied that she had ever been offered or promised leniency in the cases against her and Mr. Pawlaczyk in exchange for her testimony against defendant. She was unaware of any promises that might have been made to Mr. Pawlaczyk.

The Defense

Doctor Matthew Stubblefield, a psychiatrist, testified as an expert on Attention Deficit Disorder (ADD). He said that defendant had been his patient for eight years and suffered from ADD with hyperactivity and impulsivity; bipolar disorder; and substance abuse, mainly methamphetamine. He also suspected that defendant had a learning disorder. He said that violent tendencies are not considered part of the symptomlogy. Those who had ADD with impulsivity and hyperactivity factors, such as defendant, tend to say and do things impulsively without thinking them through. They will blurt out intense, passionate, or exaggerated feelings without inhibitions or regard for how they will be taken and not necessarily meaning what they say. He noted that defendant tended to do this and once said that he would rather burn down the building where his business is located than give it to his wife. Doctor Stubblefield did not report this nor did he consider it a red flag because he did not think defendant meant it, and defendant did not say he was intending to burn it down. He said that defendant made many exaggerated statements reflecting fantasies that he did not follow through on.

Doctor Stubblefield said he would be surprised to hear that defendant had made comments to an undercover officer about wanting to kill his wife. He said that although defendant at times appeared unkempt, he was generally lucid, cooperative, and pleasant; he was a little restless but had good eye contact and normal speech. Sometimes he was depressed; other times hypomanic. He never exhibited psychotic processes. Doctor Stubblefield knew that defendant used methamphetamines. He said that many people with ADD attempt to self-medicate with drugs. He further explained that a person taking methamphetamine would appear racy, restless, agitated, impulsive, and disconnected. Consequently, a person with ADD who is not getting treatment can appear to be on methamphetamines.

Garrick S. Lew, Pamela Carmody's attorney, testified that during defendant's trial, he was consulting with Ms. Carmody and overheard Mr. Pawlaczyk yelling to his wife. Among other things, Mr. Pawlaczyk shouted: "I'll be home October 1st. I'll be out next week." " You'll be out too. We'll both be out." "Hang in there, Babe." "Did you get the money?" "We're set up. They're giving us a place to stay and food[.]" "You have to testify. You can do it, Honey." "We're going to be here all day". "I'll see if I can get moved nearer to you." "I'm walking." "It's all good. Jim's here. Pam's hear. It's all good."

III. SUFFICIENCY OF THE EVIDENCE OF SOLICITATION

Defendant contends that there was insufficient evidence to support his conviction for solicitation. He argues that during his meeting with the undercover agents, he never requested that anyone kill his wife, and there was no direct or explicit reference to killing her. He further argues that although Mr. Pawlaczyk's testimony may show a solicitation, it could not support a conviction because it was not sufficiently corroborated.

When considering a challenge to the sufficiency of the evidence to support a criminal conviction or enhancement, we determine whether there is substantial evidence—i.e., evidence which is reasonable, credible, and of solid value—such that a

reasonable trier of fact could make the necessary findings beyond a reasonable doubt. In making that determination, we do not reweigh the evidence, resolve conflicts in the evidence, or reevaluate the credibility of witnesses. Rather, we review the whole record in the light most favorable to the judgment, we draw all reasonable inferences in support of it, and we presume the existence of every fact the trier of fact could reasonably deduce from the evidence. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319-320; *People v. Johnson* (1980) 26 Cal.3d 557, 578; *People v. Vy* (2004) 122 Cal.App.4th 1209, 1224.)

Section 653f, subdivision (b) provides, in relevant part, "Every person who, with the intent that the crime be committed, solicits another to commit or join in the commission of murder shall be punished by imprisonment . . . ."

" 'Solicitation is defined as an offer or invitation to another to commit a crime, with the intent that the crime be committed. The crime of solicitation, which is restricted to the solicitation of particular serious felony offenses, is complete once the verbal request is made with the requisite criminal intent; the harm is in asking, and it is punishable irrespective of the reaction of the person solicited. Thus, solicitation does not require the defendant to undertake any direct, unequivocal act towards committing the target crime; it is completed by the solicitation itself, whether or not the object of the solicitation is ever achieved, any steps are even taken towards accomplishing it, or the person solicited immediately rejects it. [Citations.]' [Citations.]" (*People v. Wilson* (2005) 36 Cal.4th 309, 328, quoting *In re Ryan N.* (2001) 92 Cal.App.4th 1359, 1377-1378.)

In *People v. King* (1963) 218 Cal.App.2d 602, which involved a prosecution for soliciting a bribe, the court explained that "[t]he solicitation of a bribe need not be stated in any particular language; such a solicitation may be in the form of words which carry the import of a bribe and were evidently intended to be so understood. [Citations.]" (*Id.* at p. 610; accord, *People v. Pic'l* (1982) 31 Cal.3d 731, 741.) Although the *King* court dealt with the solicitation of a bribe, its explanation, in our view, reflects a more general

rule concerning the form of a solicitation. Specifically, just as the solicitation of a bribe need not be stated in any particular language, a solicitation to murder need not take the form of a direct and explicit request to kill, murder, slay, assassinate, execute, eliminate, eradicate, exterminate, liquidate; or more colloquially, bump off, knock off, finish off, polish off, hit, waste, dispatch, rub out, take out, stamp out, do away with, do in, or neutralize. Rather, a solicitation to kill may take a more indirect form of expression as long as the words clearly convey a solicitation to kill and were evidently intended to be understood as such a request or invitation.

Here, Mr. Pawlaczyk testified that in May 2006, defendant repeatedly said that he wanted to have his wife killed. Mrs. Pawlaczyk also heard defendant say several times that he wanted to kill her.

Mr. Pawlaczyk testified that later in June 2007, after Mrs. Guasch filed for divorce, defendant got serious about making her "go away." Mrs. Pawlaczyk also heard defendant said things like, "I just want her to go away." She testified that defendant actually said that he wanted to have her killed, was talking "figures" with Mr. Pawlaczyk, and providing ideas about how to do it. Defendant told Mr. Pawlaczyk that "desperate times required desperate measures." He talked about giving Mrs. Guasch an overdose and outlined how someone could sneak into the house. Alternatively, he said that Mrs. Guasch could be dismembered and thrown down a mine shaft he knew about in the desert, where she would never be found. Defendant said he could show Mr. Pawlaczyk where the mine was located.

Mr. Pawlaczyk testified that later in June 2007, defendant offered him a lifetime job if he "would help him with the scheme to kill his wife." Mr. Pawlaczyk, in turn, told defendant about "Larry" who was a "problem solver" and could help with defendant's "problem," referring to Mrs. Guasch being killed. Defendant offered to give "Larry" some unspecified amount of cash and/or drugs as payment. Defendant also said that he could provide a gun to kill his wife.

We find the foregoing evidence sufficient to support the jury's finding that defendant asked Mr. Pawlaczyk to kill Mrs. Guasch or to help him find someone to do so.

Defendant argues that Mr. Pawlaczyk's trial testimony lacks any probative weight because he often was responding to the prosecutor's leading questions with a yes or no answer.

Defense counsel never objected to the form of the prosecutor's questions. Moreover, defendant cites no authority for the proposition that responses to leading questions may not be considered an adoption or rejection of their content or that such responses are less credible or deserve less weight than responses to non-leading questions.

Defendant argues that Mr. Pawlaczyk's statements during his interview contradict his testimony that defendant offered him a lifetime job if he helped kill Mrs. Guasch, which was the most substantial evidence of a solicitation. Defendant notes that during the interview, Mr. Pawlaczyk did not say that defendant offered him a job if he helped kill Mrs. Guasch. Rather, he told the officers that *he* asked defendant what he would offer to kill Mrs. Guasch. In other words, Mr. Pawlaczyk solicited defendant and not the other way around.

Defendant's focus on that one statement in the interview overlooks the totality of Mr. Pawlaczyk's statements during the interview about what defendant had been saying to him. As our summary reveals, the unambiguous thrust of those conversations was that defendant sought Mr. Pawlaczyk's help in his plan to have his wife killed.

Citing section 653f, subdivision (f), defendant claims there was insufficient corroboration of Mr. Pawlaczyck's testimony to support a conviction.

Section 653f, subdivision (f) provides, in relevant part, that the crime of solicitation to commit murder "shall be proven by the testimony of two witnesses, or of one witness and corroborating circumstances."

The purpose of corroboration in a prosecution for solicitation "is to guard against convictions for solicitation based on the testimony of one person who may have suspect motives." (*People v. Phillips* (1985) 41 Cal.3d 29, 76.) "Corroborative evidence is additional evidence of a different character, to the same point. [Citation.] . . . [Citations.] The corroborative evidence need not be strong nor even sufficient in itself, without the aid of other evidence, to establish the fact." (*People v. Baskins* (1946) 72 Cal.App.2d 728, 731; *People v. Burt* (1955) 45 Cal.2d 311, 316.) Indeed, such evidence "may be slight and, when standing by itself, entitled to but little consideration." (*People v. Negra* (1929) 208 Cal. 64, 69, quoting *People v. McLean* (1890) 84 Cal. 480, 482.) The evidence need not explicitly corroborate all, or even any, of the facts to which the solicitee testifies. Corroborative evidence is sufficient "if it tends to connect the defendant with the commission of the crime in such a way as may reasonably satisfy the trier of fact that the witness who must be corroborated is telling the truth." (*People v. Rissman* (1957) 154 Cal.App.2d 265, 277; *People v. MacEwing* (1955) 45 Cal.2d 218, 224; e.g., *People v. Baskins, supra*, 72 Cal.App.2d 728, 730-731 [solicitee's testimony that defendant asked him to kill corroborated by evidence that defendant also asked another person to do so].)

In addition to Mr. Pawlaczyk's testimony, Mrs. Pawlaczyk testified that although she did not know whether defendant ever asked her husband to kill Mrs. Guasch or help him find someone who would, she did hear defendant on several occasions say that he wanted to kill his wife, and she overheard defendant discuss with her husband how it could happen and seek ideas. She also heard defendant talk about different prices.

Furthermore, Mr. Pawlaczyk said that he told defendant about someone named "Larry" who needed money and could help defendant solve his "problem." Defendant indicated that he was willing to pay this man in cash and/or drugs. Mr. Pawlaczyk told defendant that defendant and "Larry" needed to talk, and he gave defendant "Larry's" phone number.

Thereafter, Agent St. Clair, posing as "Larry," called defendant, identified himself as Mr. Pawlaczyk's "friend," and met with him. When "Larry" said they needed to act quickly, defendant said there was still time. Defendant was asked to bring pictures of his wife, and he did so. Defendant also informed "Larry" that his wife had bodyguards, he described her vehicles, and he suggested how "Larry" could find out where she was living. Defendant told "Larry" that he was "between a rock and a hard place" and agreed to keep the meeting a secret. Defendant also said, "I gotta do what I gotta do to defend myself" and, when "Larry" mentioned the use of a mine shaft, defendant said that there were "many, many places." Defendant indicated that when he regained control of the cleaning business, he could provide everyone with employment. He also gave "Larry" drugs worth $4,000 as a retainer and agreed to pay more later.

In our view, defendant's meeting with "Larry" provides strong circumstantial corroboration of Mr. Pawlaczyk's testimony that defendant solicited his help in a plan to kill Mrs. Guasch with the intent that Mrs. Guasch be killed. In our view, Mrs. Pawlaczyk's testimony and the evidence of the meeting tend "to connect the defendant with the commission of the crime in such a way as may reasonably satisfy the trier of fact that [Mr. Pawlaczyk] who must be corroborated is telling the truth." (*People v. Rissman, supra,* 154 Cal.App.2d at p. 277.) In other words, this additional evidence provides ample circumstantial corroboration of Mr. Pawlaczyk's testimony to support defendant's conviction for solicitation. (See, e.g., *People v. Gordon* (1975) 47 Cal.App.3d 465; *People v. Adami* (1973) 36 Cal.App.3d 452, overruled on another ground in *People v. Superior Court (Decker)* (2007) 41 Cal.4th 1, 10-14.)

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant claims the court erred in admitting Mr. and Mrs. Pawlaczyks' taped interviews and Jennifer Scott's testimony about defendant's conduct at her office. He also claims the prosecutor's comments during opening argument about Ms. Scott's testimony and its purpose constituted prosecutorial misconduct.

Generally, the failure to raise a timely objection to errors in admitting evidence and instances of prosecutorial misconduct forfeits any such appellate claims. (*People v. Williams* (2008) 43 Cal.4th 584, 620 [admission of evidence]; Evid. Code, § 353 [same]; *People v. Brown* (2003) 31 Cal.4th 518, 553 [prosecutorial misconduct.)

Here, defense counsel did not object to the admission of evidence or alleged misconduct, and defendant implicitly acknowledges that he forfeited his claims by alternatively claiming that counsel rendered ineffective assistance in failing to object.[7]

To obtain reversal due to ineffective assistance, a defendant must first show "that defense counsel's performance fell below an objective standard of reasonableness, i.e., that counsel's performance did not meet the standard to be expected of a reasonably competent attorney[.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 1003; *Strickland v. Washington* (1984) 466 U.S. 668, 688.) Because the defendant bears this burden, "[a] reviewing court will indulge in a presumption that counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy." (*People v. Carter* (2003) 30 Cal.4th 1166, 1211.) Moreover, where the record on direct appeal "does not show the reason for counsel's challenged actions or omissions, the conviction must be affirmed unless there could be no satisfactory explanation." (*People v. Anderson* (2001) 25 Cal.4th 543, 569.) As the Supreme Court has said, "[E]xcept in those rare instances where there is no conceivable tactical purpose for counsel's actions, claims of ineffective assistance of

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[7] Defendant perfunctorily argues that an objection to the prosecutorial misconduct was unnecessary because an admonition could not have cured its prejudicial effect. (*People v. Harrison* (2005) 35 Cal.4th 208, 243-244 [objection and request for admonition unnecessary if harm is incurable]; see *People v. Hill* (1998) 17 Cal.4th 800, 820 ["A defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile."].)

We disagree. Assuming the challenged comments by the prosecutor were improper and constituted misconduct, we do not find them so inflammatory or prejudicial that jurors could not reasonably have been expected to follow an appropriate curative admonition.

counsel should be raised on habeas corpus, not on direct appeal. (*People v. Lopez* (2008) 42 Cal.4th 960, 972; *People v. Mayfield* (1993) 5 Cal.4th 142, 188 ["tactical choices presented on a silent record" are "better evaluated by way of a petition for writ of habeas corpus" and will be rejected on direct appeal].) This is particularly true where, as here, the alleged incompetence stems from counsel's failure to object. (*People v. Lopez, supra*, 42 Cal.4th at p. 972.) Indeed, "deciding whether to object is inherently tactical, and the failure to object will rarely establish ineffective assistance." (*People v. Hillhouse* (2002) 27 Cal.4th 469, 502.)

As noted, defendant also filed a petition for a writ of habeas in which he raises these claims of ineffective assistance. Accordingly, we reject them on appeal and address them in ruling on the petition.

V. VIOLATION OF THE RIGHTS TO CONFRONT AND CROSS-EXAMINE ADVERSE WITNESSES

Defendant contends the court erred in restricting his cross-examination of Mr. Pawlaczyk about the conduct underlying the charges that were pending against him. Defendant claims the restriction violated his Sixth Amendment right to confront and cross examine adverse witnesses.[8]

Background

On direct examination, Mr. Pawlaczyk said he was in custody for possessing a stolen credit card. He also admitted having four prior felony convictions for residential burglary, which render him a "two-striker." He testified that immediately after being

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[8] The Sixth Amendment to the United States Constitution provides, in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."

The Sixth Amendment right to confrontation includes the right of cross-examination. (*Pointer v. Texas* (1965) 380 U.S. 400, 404; *People v. Fletcher* (1996) 13 Cal.4th 451, 455.)

arrested, he was interviewed by police and offered them information about defendant. At that point, the tape of Mr. Pawlaczyk's interview was played.

On cross-examination, Mr. Pawlaczyk said he was facing two counts of burglary and one count of possessing a stolen credit card. He said that his prior convictions rendered him subject to a life term for future felony convictions. He explained, however, that the new case would be screened by a "three strikes committee" which would then decide whether he should be prosecuted as a one-, two-, or three-strike defendant. For example, he explained that once, after his release from prison, he learned that a drug dealer had tricked his wife and taken a car as collateral. He reported the dealer to the police. Later, he was arrested for possessing heroin and the review committee decided not to prosecute him as a three-strike defendant because his prior convictions were so old. Instead, he was returned to prison for violating parole.

Mr. Pawlaczyk admitted that he had been charged and convicted of residential burglary in 1991; and in 1995, he was charged with six counts of first degree burglary, pleaded guilty to three counts, and received a nine-year sentence. He testified that those four burglaries are what made him liable for a lengthy three-strike sentence.

Defense counsel then sought to question Mr. Pawlaczyk about the current charges. He asked whether Mr. Pawlaczyk and his wife entered a liquor store. Mr. Pawlaczyk invoked his privilege against self-incrimination, noting that the case against him had not been resolved. Defense counsel persisted, asking again whether they had entered a liquor store and later a Safeway with a credit card that did not belong to them. Mr. Pawlaczyk again invoked his rights, and the court directed defense counsel to ask questions that would not cause Mr. Pawlaczyk to invoke his rights.

At that point, the court dismissed the jury and held a hearing to allow counsel to put certain objections on the record. Defense counsel said that he wanted to explore the facts and circumstances of the pending charges because they might reveal conduct that involved moral turpitude, which was relevant to impeach Mr. Pawlaczyk's credibility.

Counsel also argued that during his interview with police, Mr. Pawlaczyk said that his wife had found the credit card, which tended to minimize the seriousness of their conduct; however, the police report indicated that less than an hour earlier, the owner of the card had reported that someone had broken the window of her car and taken her purse. Counsel argued he needed to pursue this area because Mr. Pawlaczyk's credibility was a major issue in defendant's case. Finally, because Mr. Pawlaczyk was invoking his rights and declining to answer relevant questions, counsel asked the court to strike all of his testimony on the ground that defendant was not being afforded a full and complete opportunity to cross-examine him.

The court agreed that Mr. Pawlaczyk's credibility was an issue and that the defense was entitled to impeach his credibility. However, the court observed that it was unclear when the charges against Mr. and Mrs. Pawlaczyk would be tried or resolved. The court opined that that case would be vigorously contested because it had potential three-strike consequences. The court further opined that to pre-try the underlying facts and circumstances in defendant's trial would consume too much time. The court also stated that the point in this case was to make sure the jury had sufficient evidence to judge Mr. Pawlaczyk's credibility, hear that he has prior convictions and a three-strikes case pending against him, and know that he is hoping for favorable consideration from the district attorney's office. The court said that defense counsel could ask about promises or deals that the police or prosecutor may have made and how Mr. Pawlazcyk's hoped to benefit in his case by cooperating in this case. However, citing Evidence Code section 352, the court excluded testimony about facts and circumstances underlying the pending charges, especially because it was evident that Mr. Pawlaczyk would decline to answer any questions in that area. The court did not think it would be very helpful for the jury to keep hearing Mr. Pawlaczyk invoke his rights and advised counsel to focus cross-examination on the benefit Mr. Pawlaczyk hoped for in his case. With that, the court denied the motion to strike.

Defendant claims that his inability to cross-examine Mr. Pawlaczyk about the facts and conduct underlying the charges against him violated his Sixth Amendment rights in two ways, one related to Mr. Pawlaczyk's taped interview and the other related to Mr. Pawlaczyk's direct testimony.

The Taped Interview

In *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*), the United States Supreme Court held that if a hearsay statement is testimonial in nature, it is admissible only "where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine" the declarant. (*Id*. at p. 59, fn. omitted.) However, "when the declarant appears for cross-examination *at trial*, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." (*Id*. at p. 59., fn. 9, italics added.)

Here, it is beyond dispute that Mr. Pawlaczyk's taped interview was testimonial. (*Crawford, supra,* 541 U.S. at pp. 51 [custodial examination is within the "core class of 'testimonial' statements"], 68 [statements made during custodial interrogation are testimonial].) However, he was available for cross-examination at trial, and therefore, admission of the interview does not appear to violate the *Crawford* rule.

Defendant asserts, however, that he was unable to cross-examine Mr. Pawlaczyk about statements he made during the interview related to the pending charges because he declined to answer, and the court precluded inquiry about those statements. Thus, defendant argues that as to those statements, Mr. Pawlaczyk was, in effect, unavailable for cross-examination. Consequently, the admission of those testimonial statements violated *Crawford* and defendant's Sixth Amendment rights.[9]

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[9] The Attorney General argues that defendant forfeited his constitutional claim by failing to raise it when the interview was admitted. (*People v. Burgener* (2003) 29 Cal.4th 833, 869 [constitutional claims based on evidentiary rulings forfeited]; *People v. Alvarez* (1996) 14 Cal.4th 155, 186 [same]; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1118 [same].)

Theoretically, defendant has a point. However, as a practical matter, not every actual restriction on cross-examination constitutes a violation of Sixth Amendment rights.

The Sixth Amendment guarantees the right of cross-examination, that is, " 'an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.' [Citation.]" (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 678-679, quoting *Delaware v. Fensterer* (1985) 474 U.S. 15, 20, italics in *Fensterer*.) Under the Sixth Amendment, trial courts retain wide latitude to reasonably restrict the nature and subject matter of cross-examination based on concerns about harassment, prejudice, confusion of the issues, repetitiveness, and marginal relevance. (*Delaware v. Van Arsdall, supra*, 475 U.S. at p. 679; *People v. Carpenter* (1999) 21 Cal.4th 1016, 1051.) Indeed, "[a]s a general proposition, the ordinary rules of evidence do not infringe on a defendant's right to present a defense. [Citation.] Trial courts possess the 'traditional and intrinsic power to exercise discretion to control the admission of evidence in the interests of orderly procedure and the avoidance of prejudice.' " (*People v. Frye* (1998) 18 Cal.4th 894, 945, quoting *People v. Hall* (1986) 41 Cal.3d 826, 834; *Frye* disapproved on other grounds in *People v. Doolin* (2009) 45 Cal4th 390, 421, fn. 22.)

It is settled that the exclusion of impeachment evidence under section 352 does not violate the right of cross-examination unless a reasonable jury might have received a "significantly different impression" of the witness's credibility had the excluded cross-examination been permitted. (*Delaware v. Van Arsdall, supra*, 475 U.S. at p. 680; *People v. Quartermain* (1997) 16 Cal.4th 600, 623-624.)

However, the alleged constitution violation did not become apparent until cross-examination. At that time, defense counsel complained that he was entitled to full cross-examination, and any restriction violated his rights. Moreover, he asked that Mr. Pawlaczyk's statement and testimony be stricken. In our view, defendant's objection was sufficiently timely to preserve his claim.

In our view, a similar analysis applies here. The trial court implicitly recognized that it could not force Mr. Pawlaczyk to waive his privilege against self-incrimination. (See Evid. Code, § 404 [court may not compel answer that would incriminate witness]; e.g., *People v. Lopez* (1999) 71 Cal.App.4th 1550, 1555 [court may limit examination to avoid invocation of rights by witness].) Moreover, the court also found that asking Mr. Pawlaczyk about the as yet unadjudicated facts of pending charges would set the stage for a trial-within-a-trial and unnecessarily consume time and resources. Therefore, under Evidence Code section 352, the court precluded further inquiry concerning those facts.

It is true, however, that the invocation of rights by Mr. Pawlaczyk and the court's limitation on cross-examination prevented defendant from eliciting testimony related to parts of the taped interview that might have had impeachment value. Under the circumstances, we believe that defendant's Sixth Amendment claim turns on whether a reasonable jury might have received a "significantly different impression" of the witness's credibility had the excluded cross-examination been permitted. (*Delaware v. Van Arsdall, supra,* 475 U.S. at p. 680.) We think not.

The jury heard a substantial amount of evidence relevant to Mr. Pawlaczyk's credibility. In particular, jurors learned that Mr. Pawlaczyk had numerous prior felony convictions for burglary. They learned he had served a prison term, been released on parole, and been reincarcerated for possession of heroin. They learned that his prior convictions made him vulnerable to long prison term in any future felony prosecution. They learned that he had recently been arrested for two burglaries and possession of a stolen credit card, he thought the agents would request leniency, and he hoped his cooperation would help him get lenient treatment in his case. Moreover, jurors heard defense counsel cross-examine Mr. Pawlaczyk about what he said in his taped statement.

Given this substantial amount of impeachment evidence, we do not find that the additional testimony counsel sought to elicit would have added anything of significance to the jury's impression of Mr. Pawlaczyk's credibility. The examination would have

involved facts that were wholly unrelated to defendant's alleged conduct and his guilt or innocence. None of the proposed testimony would, or could, have directly contradicted Mr. Pawlaczyk's testimony about the things defendant said to him. And the proposed testimony would have involved facts and circumstances that were disputed. In other words, the impeachment benefit defense counsel sought would not be apparent to the jury on the face of the testimony counsel sought to elicit.

In sum, therefore, we conclude that defendant's inability to cross-examine Mr. Pawlaczyk about statements in the taped interview related to collateral matters and did not render the admission of the entire interview or even those statements a violation of his Sixth Amendment rights. Rather, for all practical and meaningful purposes, Mr. Pawlaczyk was available for cross-examination.

Mr. Pawlaczyk's Direct Testimony

We reach the same conclusion concerning defendant's claim that the trial court directly violated his right to cross-examination by telling defense counsel to avoid questions about the pending charges that would cause Mr. Pawlaczyk to invoke his rights. Again, we do not find that the restriction resulted in the exclusion of testimony that might have given the jury a significantly different impression of Mr. Pawlaczyk's credibility. Thus, the court's restriction did not impermissibly interfere with defendant's Sixth Amendment rights.

VI. EXCLUSION OF OTHER EVIDENCE TO SHOW THE FACT UNDERLYING THE PENDING CHARGES

In a related claim, defendant contends that the court abused its discretion in excluding other proposed evidence about the charges pending against Mr. and Mrs. Pawlaczyk. In particular, defense counsel sought to present witnesses from the two stores that were allegedly burglarized and the owner of the allegedly stolen credit card. Counsel argued that their testimony would reveal that Mr. Pawlaczyk's conduct showed moral turpitude and therefore was relevant to impeach his credibility.

In excluding the evidence, the court found that it would take several witnesses and about half of a day to present the proposed evidence and thereby cause "a significant delay in the proceedings." Echoing its previous ruling, the court opined, "I don't know that the jury needs additional information, nor would benefit from additional information concerning moral turpitude on the part of Mr. Pawlaczyk." The court continued, "They have ample evidence concerning his motivation to either tell the truth or not in light of his pending life imprisonment case. They also are aware of prior moral turpitude convictions, including theft-related behavior, so they should have ample opportunity to make such decisions about his credibility that they choose to make." The court then found that the probative value of the proposed evidence was "small" and outweighed by the potential prejudice from the time it would take to present the evidence and the potential complications to other cases that could arise due to Mr. Pawlaczyk's invocation of rights and testimony under oath by others witnesses about unadjudicated crimes. The court concluded, "Ultimately, I don't think this will deny the defendant a fair trial, because I think the jury can get a clear idea of Mr. Pawlaczyk's credibility without this evidence."

Trial courts are vested with broad discretion in determining the probative value and prejudicial effect of proffered evidence, and courts may exclude testimony "if its probative value is outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352; *People v. Lewis* (2001) 26 Cal.4th 334, 374-375; *People v. Sassounian* (1986) 182 Cal.App.3d 361, 402; *People v. Mota* (1981) 115 Cal.App.3d 227, 234.) A trial court's ruling will not be disturbed on appeal unless the party challenging it clearly shows that court "exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10; *Smith v. Smith* (1969) 1 Cal.App.3d 952, 958.) When reviewing a ruling, we view the evidence

in the light most favorable to the ruling and draw all reasonable inferences in support of it. (*People v. Roldan* (2005) 35 Cal.4th 646, 705, overruled on other grounds in *People v. Doolin*, *supra*, 45 Cal.4th at p. 421, fn. 22; *People v. Condley* (1977) 69 Cal.App.3d 999, 1015.)

Here, the potential impeachment value of the evidence defendant sought to introduce was limited by the fact that the circumstances underlying the pending charges were disputed, Mr. Pawlaczyk declined to answer questions about them, and he had not yet been found guilty of any wrongful conduct. Moreover, to the degree that the proffered testimony might have shown conduct involving moral turpitude, it was unnecessary because it was cumulative and far less probative than the undisputed evidence already admitted of Mr. Pawlaczyk's numerous prior convictions for burglary and theft-related conduct. Similarly, to the extent that the proffered testimony revealed a motive for Mr. Pawlaczyk to falsely incriminate defendant to gain lenient treatment in his own case, the proposed testimony was cumulative and unnecessary. The jury heard far more compelling direct evidence from Mr. Pawlaczyk himself to the effect that he sought leniency in return for his cooperation.

On the other hand, as the court found, the direct and cross-examination of witnesses on disputed factual matters that were wholly unconnected to defendant's intent and conduct would unnecessarily consume judicial resources and create a potentially confusing mini-prosecution of Mr. Pawlaczyk.

Accordingly, we do not find that the exclusion of evidence was unreasonable, arbitrary, or capricious; or that it resulted in a miscarriage of justice.[10]

[10] Given our discussion and because the evidence of solicitation is strong, we would find any error in excluding the proffered impeachment testimony to be harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

VII. *BRADY* VIOLATION

Defendant contends that the prosecution's failure to disclose the law enforcement officers' "request for leniency" to the district attorney on Mr. Pawlaczyk's behalf violated his right to due process.

In *Brady, supra,* 373 U.S. 83, the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." (*Id*. at p. 87.) Thus, under *Brady* and its progeny, the state is required to disclose to the defense any material, favorable evidence, which includes both evidence that is exculpatory to the defendant as well as evidence that is damaging to the prosecution. (*Ibid*.; *United States v. Bagley* (1985) 473 U.S. 667, 674-678.)

Defendant notes that Mr. Pawlaczyk thought that police had made a request for leniency to the district attorney in his case. He notes that Mr. Pawlaczyk was offered a 32-month plea bargain. And he notes that Mr. Pawlaczyk was overheard making statements to his wife to the effect that they were going to get out and be given food and a place to stay. Defendant claims that taken together, this information suggests that Mr. Pawlaczyk had an agreement with the prosecution for favorable treatment in exchange for his testimony. He argues that prosecution's failure to disclose the request for leniency and agreement violated *Brady* and his right to due process.

The record reveals that after speaking with is parents, Mr. Pawlaczyk understood that Agent Mecir had requested leniency in his case. However, Agent Mecir testified that he did not request leniency for Mr. Pawlaczyk or communicate with anyone in the district attorney's office for that purpose. Rather, he simply informed the prosecutor in defendant's case that Mr. Pawlaczyk was cooperating and had agreed to testify.

Moreover, Mr. Pawlaczyk testified that no one from the district attorney's office had offered him any deal in exchange for his testimony against defendant. He also did

not know whether the so called "three strikes committee" ever received a request for leniency on his behalf. Similarly, Mrs. Pawlaczyk testified that she was not promised anything in exchange for her testimony and was unaware of any promises or request for leniency on Mr. Pawlaczyk's behalf.

Under the circumstances, defendant cannot establish the factual premise of his claim—i.e., that there was, in fact, a request for leniency or deal for Mr. Pawlaczyk's testimony that the prosecutor failed to disclose.[11]

VIII. CONSECUTIVE TERMS FOR COUNTS TWO AND THREE

Defendant contends that the separate prison terms for counts two and three violated the proscription against multiple punishment in section 654.[12] Those counts alleged that on June 27, 2007, defendant violated section 11352 of the Health and Safety Code, which makes it a crime to transport, import into the state, sell, furnish, administer, or give away a controlled substance. The two counts were based on the oxycodone that defendant gave to Agent St. Clair during their meeting.

Section 654 is intended "to ensure that a defendant's punishment is commensurate with his [or her] culpability." (*People v. Perez* (1979) 23 Cal.3d 545, 552.) The statue bars multiple punishment for both a single act that violates more than one criminal statute and multiple acts, where those acts comprise an indivisible course of conduct incidental to a single criminal objective and intent. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208; *People v. Bauer* (1969) 1 Cal.3d 368, 376; *In re Ward* (1966) 64 Cal.2d 672, 675-676; *Neal v. State of California* (1960) 55 Cal.2d 11, 19.) Conversely, where a defendant commits multiple criminal offenses during a single course of conduct, he or she may be

[11] We note that defendant reasserts this claim in his petition for habeas corpus based on additional evidence outside the record on appeal.

[12] Section 654 provides, in relevant part, "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

separately punished for each offense that he or she committed pursuant to a separate intent and objective. (*People v. Beamon* (1973) 8 Cal.3d 625, 637-639.)

Whether a single course of conduct is divisible into different offenses based on separate intents and objectives is a question of fact for the trial court, and its express or implicit findings will be upheld on appeal when they are supported by substantial evidence. (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.) In this regard, we review the trial court's determination in the light most favorable to the respondent and presume the existence of every fact the trial court could reasonably deduce from the evidence. (*Ibid*.)

It is undisputed that the transporting and furnishing of drugs was part of a single, unbroken course of conduct. Defendant brought oxycodone to his meeting with "Larry" and then gave it to him. The issue is whether there was substantial evidence to support the court's implicit finding that defendant transported the drugs and gave them to "Larry" for different reasons.

The Attorney General argues that there were separate reasons or objectives. He notes that (1) the two acts were separated by time and place, (2) defendant did not talk to "Larry" about the form of payment before the meeting, (3) defendant was a drug dealer, and (4) defendant brought numerous tablets with him. However, these facts and circumstances do not support the trial court's implicit finding of separate objectives.

First, driving to the meeting and furnishing the drugs were not so separated in time and place as to suggest separate objectives. Similarly, we fail to see how the number of pills defendant brought suggests a separate objective. Second, there is no evidence that in the ordinary course of his life and drug dealing, defendant carried bottles of oxycodone with him just in case he ran into a potential buyer. Thus, the fact that defendant was a drug dealer does not suggest that he had a reason to bring the drugs to the meeting apart from bringing them in the hope of using them as partial payment for the murder of his wife.

On the other hand, Mr. Pawlaczyk testified that after defendant offered him a job if helped him kill his wife, and after Mr. Pawlaczyk told defendant about "Larry," defendant offered to give "Larry" some unspecified amount of cash *or drugs*, including pseudoephedrine tablets and oxycontin, in lieu of cash as payment. Moreover, at the meeting, defendant told "Larry" that he had different prescription pills that he could offer him. "Larry" wondered if defendant had any "scrips that can help with the payment." He indicated that he would accept a combination of drugs and cash as payment. After a brief unrelated discussion, "Larry" said he was not going to "wait on this forever, bro." Defendant agreed, saying "No, I'm not waiting forever either." Shortly thereafter, defendant gave the drugs to "Larry."

Evidence that merely raises a possibility is not a sufficient basis for an inference of fact. (*People v. Redmond* (1969) 71 Cal.2d 745, 755; accord, *People v. Samuel* (1981) 29 Cal.3d 489, 505.) "In any given case, one 'may speculate about any number of scenarios that may have occurred . . . . A reasonable inference, however, "may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work. [¶] . . . A finding of fact must be an inference drawn from evidence rather than . . . a mere speculation as to probabilities without evidence." ' " (*People v. Cluff* (2001) 87 Cal.App.4th 991, 1002; accord, *People v. Ramon* (2009) 175 Cal.App.4th 843, 851; *People v. Tripp* (2007) 151 Cal.App.4th 951, 959; see *People v. Raley* (1992) 2 Cal.4th 870, 891 [an inference is not reasonable if based on speculation].)

Here, the record supports a reasonable inference that defendant brought the drugs to the meeting for the purpose of retaining "Larry" to solve his "problem." On the other hand, we consider it speculation that defendant brought the drugs along with him for some other, unrelated purpose. Accordingly, the record does not reasonably support a finding of separate objectives for counts two and three. Thus, separate punishment section 654, and the term for one count must be stayed. (*People v. Beamon, supra,* 8 Cal.3d at pp. 639-640; *People v. Dominguez* (1995) 38 Cal.App.4th 410, 420; e.g.,

People v. Lopez (1992) 11 Cal.App.4th 844, 8848-850; cf. *People v. Avalos* (1996) 47 Cal.App.4th 1569, 1583 [no separate punishment for possession and transportation of same drugs].)[13]

IX. DISPOSITION

The judgment is modified to stay the 16-month consecutive term imposed on count three. As modified the judgment is affirmed. The clerk of the Santa Clara County Superior Court is directed to prepare a new abstract of judgment that reflects the stay.

_____
RUSHING, P.J.

WE CONCUR:

_____
PREMO, J.

_____
ELIA, J.

[13] Since the two terms imposed on counts two and three are identical, it does not matter which one is stayed.